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In the Supreme Court of the United States

PAUL FORMAN, PETITIONER

v.

LAWRENCE M. SMALL, SECRETARY,
SMITHSONIAN INSTITUTION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's grant of summary judgment for respondent on petitioner's claim that age discrimination was the reason he was not promoted to a GS-14 position in 1991.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 271 F.3d 285. The order of the district court granting summary judgment (Pet. App. 30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2001. Petitions for rehearing were denied on December 26, 2001 (Pet. App. 28a, 29a). The petition for a writ of certiorari was filed on March 26, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a curator of modern physics at the National Museum of American History in Washington, D.C., which is part of the Smithsonian Institution. Pet. App. 2a. In May 1988, he requested that he be temporarily assigned to a duty post in New York City, for a period of two years, so that he could prepare a draft of a book on the history of atomic clocks. *Ibid.* This request was approved, and petitioner began his assignment in New York City in August 1988. *Ibid.*; Pet. 4; Defendant's Statement of Material Facts Not in Dispute (Statement of Material Facts), para. 11. In rating petitioner's performance for the year September 1, 1988, to August 31, 1989, petitioner's supervisor made clear that he expected a "concentrated and sustained effort" on the book. Pet. App. 2a. Unable to complete the task, petitioner proposed in January 1990 that, having drafted only one chapter of the proposed book, he write a shorter book that would be narrower in scope than the book originally planned and would focus upon one inventor, Charles Townes. *Id.* at 2a-3a; Pet. 4. Although this change was approved, petitioner's interim performance appraisal was "unacceptable" as to the "single critical element" of his assignment, which was writing the book. Pet. App. 3a. His final performance appraisal was "fully successful," because he had begun to write "commendable draft chapters" of the newly proposed book. *Ibid.* Petitioner failed to achieve the higher performance ratings of "outstanding" or "highly successful." See *id.* at 4a n.3. Petitioner returned to work in Washington, D.C., in 1990, with the book still not completed. *Id.* at 3a. For the 1990-1991 rating year, petitioner again received only the "fully successful" rating. *Ibid.*

In April 1991, a peer review committee recommended that petitioner be promoted to GS-14. Pet. App. 4a. The Director of the Museum of American History (the Director) declined to recommend that petitioner be promoted because none of petitioner's supervisors believed he was working at a GS-14 level, and petitioner had failed to complete the book which had been a primary performance goal since 1978. *Ibid.* Petitioner, accordingly, was not promoted. *Id.* at 4a-5a.

Petitioner filed a timely EEO complaint in 1992, alleging that he had not been promoted to a GS-14 position because of age discrimination. Pet. App. 5a. After a two-day hearing, the Administrative Law Judge recommended a finding of no discrimination. The Smithsonian adopted this as its final agency decision. On September 12, 1996, the Equal Employment Opportunity Commission's (EEOC) Office of Federal Operations affirmed the Smithsonian's final decision. Statement of Material Facts, para. 1.

2. In 1995, petitioner was again considered for promotion to GS-14. Pet. App. 5a. While the peer evaluation committee again recommended that petitioner be promoted, a new Secretary of the Smithsonian and a new Director had taken over and made substantial institutional changes. They had reduced curatorial units, abolished certain positions, and instituted a different process for making promotion decisions. *Ibid.* They had also changed the Museum's priorities, from "academic mode" to "customer service" mode. *Ibid.* In order to allow determination of whether petitioner's performance warranted granting petitioner a promotion under the new priorities and structure, the final decision on petitioner's promotion was postponed for one year. *Id.* at 6a. Ultimately, petitioner was pro-

moted to Grade 14 in 1996, when he was 59 years old. *Id.* at 2a.

3. In February of 1996, petitioner filed a timely EEO complaint, charging that the failure to promote him in 1995 was due to age discrimination, and was a reprisal for his previous EEO complaint. Statement of Material Facts, para. 2. Although he had already been promoted to the GS-14 position, petitioner thereafter filed this lawsuit against respondent pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a (1994 & Supp. V 1999). He sought promotion retroactive to 1991, "together with all back pay and related benefits and promotions that would have accrued, including promotion to GS 15." Statement of Material Facts, para. 6. After the filing of this lawsuit, petitioner's administrative EEO complaint was dismissed. *Id.* para. 2.

4. After allowing discovery, the district court granted respondent's motion for summary judgment, ruling that petitioner had failed to produce sufficient evidence upon which a fact-finder could conclude that he was the victim of either age discrimination or retaliation. Pet. App. 59a. The court ruled that respondent had articulated a legitimate, non-discriminatory reason for its decision not to promote the petitioner in 1991-1992, which was his failure to produce a book, as was provided for in his performance plan. *Id.* at 44a. The court also ruled that respondent had articulated a legitimate non-discriminatory reason for the failure to promote in 1995, and that petitioner had failed to show that respondent's explanations were a pretext for age discrimination or retaliation. *Id.* at 58a-59a.

5. The court of appeals affirmed in part and reversed in part. With respect to the failure to promote in 1991, which is the sole issue raised in the petition for certio-

rari (Pet. 2-3), the court of appeals ruled that petitioner had produced no direct evidence of age discrimination, but had nonetheless met his initial burden of production, a burden "which is not onerous." Pet. App. 11a. While the court acknowledged that petitioner had introduced statistical evidence, and evidence of age-based comments during the period of his evaluation for the GS-14 position,[1] the court concluded that respondent met its burden of production under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), by articulating a legitimate non-discriminatory reason for his non-promotion—the failure of petitioner in his principal responsibility of producing a booklength manuscript—and presenting evidence to support its contention. Pet. App. 11a-12a.

The court also determined that the reason given by the Smithsonian was not a pretext. "It is undisputed," wrote the court, "that Dr. Forman's performance plans for the relevant period called for him to produce a book or comparable body of work. Dr. Forman did not produce evidence to show fulfillment of this requirement." Pet. App. 12a. The court observed that "Dr. Forman admitted that he finished neither his atomic clock book nor his Townes manuscript. * * * Hence, notwithstanding the age-based comments at the discussion of his promotion, the Smithsonian produced

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[1] Petitioner submitted statistical evidence that, although several older Smithsonian curators were in fact promoted, in general Smithsonian employees under 45 years of age had a higher rate of promotion to the GS-14 level than those over 45 years of age. See Pet. App. 10a. He also submitted anecdotal evidence, contested by respondent, that comments were made during the 1991 consideration of his promotion that he might be in the "twilight of his career" and may have "written his last significant article." See *id.* at 11a.

evidence of a nondiscriminatory reason for denying him a noncompetitive promotion in 1991." *Ibid.*

The court went on to hold that petitioner failed to present a prima facie case of age discrimination with respect to the 1995 denial of his promotion, but held that petitioner had produced sufficient evidence to make out a prima facie case of retaliation. Pet. App. 14a-15a. The court thus reversed the grant of summary judgment on the retaliation issue, and remanded for further proceedings. *Id.* at 26a-27a.[2]

ARGUMENT

Petitioner contends that, in considering the failure to promote him in 1992, the court of appeals misapplied the standards for determining whether a plaintiff seeking a non-competitive promotion has established a violation of the ADEA. The court of appeals, however, applied the settled standards for resolving that issue, and its fact-bound application of those standards raises no issue warranting this Court's review.

1. Courts addressing ADEA claims apply the burden-shifting framework announced in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and refined in later cases. See, *e.g.*, *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000). *McDonnell Douglas* and its progeny establish "an allocation of the burden of production and an order for the presentation of proof in * * * discriminatory-treatment cases." *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506 (1993). "First, the plaintiff must establish a prima facie case of

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[2] The court also stated, in a separate section of its decision, that the ADEA provides a cause of action for retaliation when the plaintiff is a federal employee. Pet. App. 16a-22a. That issue, like petitioner's age discrimination claim arising out of the events of 1995, is not before the Court for review. Pet. 2-3.

discrimination." *Reeves*, 530 U.S. at 142 (citations omitted). If the plaintiff makes out a prima facie case, the burden then shifts to the defendant to produce evidence of a legitimate, non-discriminatory reason for its actions. *Ibid.* If the defendant carries this burden, which is a burden only of production, and not persuasion, "involv[ing] no credibility assessment," *ibid.* (internal quotation marks and citations omitted), the *McDonnell Douglas* framework and its presumptions and burdens disappears. *Id.* at 142-143. The plaintiff must then satisfy its "ultimate burden"—to "persuad[e] the trier of fact that the defendant intentionally discriminated against the plaintiff." *Id.* at 143 (internal quotation marks and citations omitted). The plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Ibid.* (internal quotation marks and citations omitted).

2. Petitioner asserts that the court of appeals applied different standards in this case, involving a non-competitive promotion, than it would have had a competitive promotion been at issue. This contention is without merit. The court of appeals correctly applied the *McDonnell Douglas* and *Reeves* framework in resolving petitioner's ADEA claim regarding the failure to promote him in 1991. The court did distinguish petitioner's case from an earlier case the court of appeals had heard, in which the plaintiff had presented evidence showing that he was "markedly more qualified" than the person ultimately selected. Pet. App. 13a (citation omitted). The court merely pointed out that the particular tasks others who were promoted may have or may not have completed were not relevant to showing discrimination where petitioner had failed to "fulfill[]

the central purpose of his sabbatical and performance plans." *Ibid.* The court took into account the circumstantial evidence introduced by petitioner to support his claim of discrimination and held that petitioner "has presented a prima facie case that shifts the burden of coming forward with evidence to the Smithsonian to show that its action was not based on [petitioner's] age." *Id.* at 11a-12a. The court then determined that the Smithsonian met its burden of production by "presenting evidence that [petitioner] was not promoted because of his failure to produce a booklength manuscript on atomic clocks 'or any other work of comparable scope.'" *Ibid.* The court went on to note, correctly, that "[b]ecause [petitioner] has no direct evidence of age discrimination, the dispositive question is whether he showed that the Smithsonian's explanation for its decision not to promote him in 1991 was a pretext for discrimination." *Ibid.* The court then found insufficient evidence to show pretext. "It is undisputed," wrote the court, "that [petitioner's] performance plans for the relevant period called for him to produce a book or comparable body of work. [Petitioner] did not produce evidence to show fulfillment of this requirement. * * * Dr. Forman admitted that he finished neither his atomic clock book nor his Townes manuscript." *Id.* at 12a.

In sum, the court applied the burden-shifting standards of *McDonnell Douglas* as it would in any discrimination case, taking into account all the circumstantial evidence presented by the petitioner. It determined that, based on the record in this case, petitioner's evidence was insufficient to permit a reasonable factfinder to conclude that the decision not to promote him to a GS-14 level reflected an intent to discriminate on the basis of age. Thus, while petitioner asserts that, in

addressing pretext, the court of appeals treated the explanation put forward by respondent—that petitioner failed to complete a booklength manuscript—"as unassailable by any means other than direct demonstration of its falsity" (Pet. 8), this assertion is wrong. The petitioner simply did not satisfy his burden of production because he did not come forward with any evidence to suggest that the reason articulated for his not getting the promotion was pretextual. He did not present evidence that, for example, he was fully engaged in curatorial responsibilities even as he attempted to write the proposed book, and thus should not have been denied a promotion, or that other curators had been promoted despite failure to meet the central purposes of their performance plans. As both lower courts correctly found, the preparation of a booklength manuscript was petitioner's "primary task" for two years, and thus "[h]is normal day-to-day duties as curator, relating to exhibitions and collections, were minimized." Pet App. 2a. The court took into account petitioner's evidence, but ultimately found no showing of age discrimination. Since no trier of fact could find age discrimination on this record, and since the court applied the correct legal standards, certiorari should be denied.

3. Petitioner further contends that the court of appeals' decision conflicts with the holdings of other circuits. Pet. 18. But because, as explained above, the court of appeals did not apply any law to petitioner's claim arising out of the events of 1991, other than the well-established *McDonnell Douglas* framework, no circuit split requiring resolution has been created.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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